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ABSTRACT

The dilemma of disciplinary discretion is that on the one hand it avoids discrimination by allowing individualized treatment, but on the other hand it invites discrimination by leaving it up to the administrator to determine what discipline shall be imposed for what offense. The law imposes very few and easily met restraints. To ensure that discipline is nondiscriminatory, the principal should attempt the following: (1) make all disciplinary rules as clear and precise as possible, avoiding distinctions based on race, sex, or physical handicap; (2) make sure, if a rule seems to have a disproportionate negative effect on students of one race or sex, or on another group that might claim discrimination, that the rule has a legitimate educational purpose and that the disproportionate impact has a demonstrable, nondiscriminatory cause; (3) make sure that fair rules are being administered in a fair manner (there is nothing wrong with the use of administrative discretion if it is exercised in a rational, consistent way free of bias); (4) enact disciplinary penalties that are not only permissible under state law, but also appropriate in severity to the rule violation involved; and (5) demonstrate concern about any policy that has a disproportionate negative effect on any legally protected group. (Author/IRT)

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A Legal Memorandum

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DISCIPLINE, DISCRIMINATION, DISPROPORTIONALITY AND DISCRETION

School Discipline and Constitutional Rights

School disciplinary practices, procedures, and penalties are not only subject to the constitutional command of fundamental fairness (*Goss v. Lopez*, 419 U.S. 565 [1975]), but also to the legal principles of equal protection, equality, and evenhandedness. While most school administrators are familiar with the requirements of due process, it is important to keep in mind that the 14th Amendment to the U.S. Constitution guarantees the equal protection of the laws as well.

Since *Brown v. Board of Education*, 347 U.S. 483 [1954] equal protection has come to mean nondiscrimination on the basis of race in school policies and practices. While the central thrust of *Brown* and its offspring has been the dismantling of segregated school systems, the requirement of nondiscrimination applies equally as well to school discipline. If the first disciplinary duty of school officials is to provide students with due process notice and hearing, the second and equally as significant duty is not to discriminate on illegitimate or suspect bases.

There has been much discussion and debate about the meaning of nondiscrimination. Nondiscrimination has been interpreted to mean that similarly situated students are to be treated similarly but not necessarily the same. Nondiscrimination means individualized, not identical, treatment; equivalent rather than exactly equal. Since no two persons or students are alike or possess the same personality traits, characteristics, or backgrounds it is not improper or unlawful to treat two students differently--so long as the difference in treatment is based on legitimate and nondiscriminatory criteria.

A problem arises when administrators are faced or torn between dealing with two, let us say, equally guilty or culpable students, in different ways. On the one hand, the administrators possess the discretion to individualize the discipline or punishment to fit the offender. On the other, they recognize their responsibility to be consistent, uniform, and evenhanded in the administration of discipline throughout the school. The administrators may well face a larger morale problem if they hand out drastically different disciplinary sanctions to the two students who committed the same offense with the same degree of culpability.

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Yet, the same penalty may very well not be appropriate for each offender. One student may have had a long history of disciplinary trouble, whereas the other student may be a first offender. Responding to the myriad of factors present in every disciplinary case surely tests administrators' abilities to exercise sound and sensible discretion. Yet, that is their legal and constitutional duty. Ensuring the appearance as well as actuality of fairness in discipline is a most difficult task. The matter is more complex than the simple choice of consistency over individuality. There is, however, no necessary conflict between the two. Skilled and sensitive administrators can consistently exercise informed discretion in an evenhanded manner that accomplishes both objectives.

Statutory Protection of Nondiscrimination

The legal duty not to discriminate in discipline derives from federal and state anti-discrimination statutes as well as from the Equal Protection Clause of the U.S. Constitution.

Title VI, Section 601, of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d-1 et seq., prohibits discrimination on the basis of race, color, or national origin. Title IX of the Education Amendments of 1972, 16 U.S.C. Section 1681 et seq., prohibits discrimination on the basis of sex in public school programs receiving federal financial assistance. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, and the Education of All the Handicapped Children Act, 16 U.S.C. Section 1401 et seq., prohibits discrimination on account of handicap.

Many state statutes do likewise. Connecticut General Statute, Section 10-15, says that "(t)he public schools shall be open to all children over five years of age without discrimination on account of race, color, sex, religion, or national origin...." Massachusetts General Laws c.71, Section 5 (Chapter 622) prohibits exclusion or discrimination in the advantages, privileges, and courses on account of race, color, sex, religion, or national origin. (See also M.G.L., c. 151c--"Unfair Educational Practices Act.")

The relevant Title IX regulations provide in pertinent part:

> A recipient shall not, on the basis of sex:
>
> (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;
> (5) Discriminate against any person in the application of any rules of appearance.
>
> 45 C.F.R. Section 86.31(b)

It would be a clear violation of constitutional, federal and state law and regulation to subject one sex or race and not the other sex or race to harsher or different forms of disciplinary sanctions. Despite the constitutionality of reasonable corporal punishment (*Ingraham v. Wright*, 430 U.S. 651 [1977]), it is not unheard of for school officials to administer corporal punishment to boys and not to girls. In *Calway v. Williamson*, 130 Conn. 575, at 579 (1944) the Court identified "sex" as one of the various considerations, in addition to age, size, and strength of pupil, nature of offense, apparent motive and disposition of the offender, and the influence of example and conduct upon other students, in determining what is reasonable punishment.

It is interesting to note, however, that in a much earlier Connecticut case, *Sheehan v. Sturges*, 53 Conn. 481, at 484 (1885), sex is not mentioned as one of the considerations to be taken into account in governing the mode and severity of punishment. These factors included the nature of the offense, the age, size, and apparent powers of endurance of the pupil, mental and moral qualities, general behavior in school, attitude toward teachers, and past and accumulative offenses. While the above criteria can be constitutionally considered, race, sex, color, national origin, handicap and religion cannot be. And, to the extent the prohibition against sex discrimination covers discrimination on the basis of pregnancy or marital or parental status (45 C.F.R. section 86.40, see also *Ordway v. Hargraves*, 323 F. Supp. 1155 [D.Mass.1971], these factors are also prohibited bases for discipline.

Discipline and the Handicapped

Discrimination in discipline on the basis of a student's handicap is proscribed by Section 504 of the Rehabilitation Act 29 U.S.C. Section 794, and by the Education of All Handicapped Children Act of 1975, 16 U.S.C. Sec. 1401 et seq. The federal statutory prohibition is against discrimination--not against consideration or "reasonable accommodation" of the handicap or the special condition. In fact, "reasonable accommodation" is required under the federal regulations in certain circumstances (45 C.F.R. Section 84.12).

It might well be unlawful to fail to take into account a student's handicap in fashioning an appropriate disciplinary response. An administrator is not apt to utilize a disciplinary measure that may aggravate a student's handicap. It has been urged that a moratorium be declared on the use of corporal punishment on exceptional children (Smith, Polloway, and West, "Corporal Punishment and Its Implications to Exceptional Children," Exceptional Children, January 1979). The regulation authorizing corporal punishment upheld in *Ingraham v. Wright* cautioned against its use on a student under psychological or medical treatment (fn. 7).

Section 504 regulations contain broad prohibitions against discrimination on the basis of handicap (45 C.F.R. Section 84.4) and specifically forbid the utilization of criteria or methods of administration that have the effect of subjecting qualified handicapped persons to discrimination (45 C.F.R. Section 84.4 (b)(VII)(4).

The Education of All the Handicapped Children regulations deal with discipline issues in two sections. The comment to Section 121a.513 makes clear that a public school is not precluded from using its normal procedures for dealing with children who are endangering themselves or others. This Section also makes clear that a child's placement cannot be changed during the pendency of a complaint proceeding. What this means is that an exceptional or handicapped child may not be permanently expelled pending resolution of the complaint, but that short-term disciplinary sanctions do not constitute a change in educational status and may be used against such a student where warranted (*Stuart v. Nappi*, 443 F.Supp. 1235 [D. Conn.,1978]).

The comment to Section 121a.552 on educational placements in the most regular and least restrictive environment quotes from paragraph 24 of Appendix A of the 504 regulations. This comment states that a regular placement is inappropriate for a handicapped child who "is so disruptive in a regular classroom (such) that the education of other students is significantly impaired."

Race Discrimination in Discipline

Racial discrimination in disciplinary practices and penalties has often been charged, especially in school systems undergoing desegregation. The basic conclusion to be drawn from studies of this issue is that black students are suspended or expelled at a rate more than twice their proportion of the school population. (The Student Pushout Report, 1974; Children Out of School in America, 1974. See generally, Mark Yudof, "Suspension and Expulsion of Black Students from the Public Schools: Academic Capital Punishment," Law and Contemporary Problems, spring 1975.)

There are many and varied explanations for this statistical disparity, including racial, cultural, and institutional reasons. In some cases, at least, racial prejudice on the part of school personnel is certainly a major factor. At least one court cited "racism" as the chief cause of the disproportionate number of black students being suspended (*Hawkins v. Coleman*, 376 F.Supp. 1330; N.D. Tex. 1974). Short of ridding the schools of racist personnel, the question is what can schools do to reduce the disproportionate number of minority students who are subject to more frequent and longer disciplinary sanctions. The answer lies in self-examination and structural reform. Schools must examine their structures and policies, increase community support, train teachers and administrators to deal with their own racial attitudes and behaviors, and most important, treat and discipline students in a nondiscriminatory, neutral way.

The latter task--nondiscriminatory discipline--presents the greatest challenge. Few administrators are willing to admit that improper considerations figure into disciplinary decisions. It is by no means suggested that such are frequent occurrences. But discrimination does exist and the questions that need answering are how to detect it legally and how to guard against it.

Detecting Discrimination in Discipline

The detection of legal discrimination is difficult at best. Until 1976, the courts could base their decisions on statistical evidence alone. The mere demonstration of a racially disproportionate impact or effect of a school policy shifted the burden to the school district to show a legitimate or non-racial reason for the disproportionality. In June 1976, however, the U.S. Supreme Court in *Washington v. Davis*, 426 U.S. 299, held that a disproportionate impact alone does not demonstrate discrimination. A discriminatory purpose or intent must also be proven in order to support a finding of a constitutional violation of equal protection. The Court said that disproportionate impact was not irrelevant but that it was not the sole touchstone of invidious discrimination either.

In *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), the Supreme Court defined further kinds of evidence necessary to establish discriminatory intent or purpose. These include the degree of disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of decision makers.

As a result of the decision the proof of constitutional discrimination is much more difficult than proof of discrimination under specific federal statutes. The *Washington v. Davis* decision suggests that discrimination claims in disciplinary

practices can be considered under the less stringent statutory standards that have been developed in employment discrimination cases (*Griggs v. Duke Power Company*, 401 U.S. 424, 1971; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 1973; *Furnco Construction Co. v. Waters*, 98 S.Ct. 2943, 1978; *Board of Trustees of Keene College v. Sweeney*, 99 S.Ct. 295, 1978.)

Once a plaintiff establishes an apparent case of discrimination by showing that he or she is a member of a protected class and that the discriminatory act was the dominant motive in the action, the burden then shifts to the defendant to rebut the implication that the discriminatory effect was intentional. Rebuttal can be accomplished by articulating some legitimate, nondiscriminatory, and non-pretextual reason for the action. There need not be any proof that the defendant did not have a dominant discriminatory motive.

What this all means in the disciplinary context is that school officials can rebut a charge of discrimination in discipline by articulating a legitimate, nondiscriminatory, racially neutral reason for any racial disproportionality in disciplinary penalties. Such a reason would be the commission of a legitimate disciplinary offense or violation of a school rule. But the school rule violated might itself be a pretext for discriminatory discipline.

Yudof (supra) suggests that "failure to adhere to institutional rules relating to respect for authority and timeliness is the primary cause of black exclusions." Tardiness, truancy, and talking back to teachers seem to get black students into more trouble, more frequently, than white students. If this is the case, modifying these rules to accommodate black students' attitudes toward authority and attention to time or greater efforts to socialize black students to the values of punctuality and obedience to authority are two ways to meet this problem and mitigate the disproportionality of minority discipline. The first step is for schools to examine their rules and policies to determine which have a disproportionate impact on minorities. These rules should then be examined to see whether they might be modified so as to mitigate the discriminatory impact and still maintain valid institutional objectives.

The Role of Administrative Discretion

School officials' wide discretion to administer discipline poses a potential for discrimination. General rules with undefined or broadly defined standards of (mis)conduct invite subjective and discriminatory application. Principals who must enforce vague or overbroad rules are left with little more than their "subjective opinions" or "arbitrary whims" as to what in fact constitutes a violation, *Crossen v. Fatsi*, 309 F.Supp. 114 at 117 (D.Conn. 1970).

Clarity and specificity in rule drafting and definition can go a long way toward eliminating ambiguity and arbitrariness. Yet school administrators are not held to the strict standards of public prosecutors in framing disciplinary charges, *Hasson v. Boothby*, 318 F. Supp. 1183, at fn.3 (D.Mass., 1970). The rule on rule development is "flexibility and reasonable breadth rather than meticulous specificity" or "mathematical certainty," *Grayned v. City of Rockford*, 408 U.S. 104 (1971); *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088, (8th Cir., 1969), cert. denied 398 U.S. 965 (1970). School rules that clearly define standards of conduct are sufficiently related to the educational process,

minimize discriminatory impact, and are reasonably designed to avoid disruption of classroom decorum and distraction of other pupils, and to prevent disturbances are the ideal toward which we must strive. "Condemned to the use of words," *Grayned*, above, it is much easier to criticize school rules as vague, overbroad, and ambiguous than it is to draft constitutionally clear and certain ones.

Another area of potential discrimination lies in the relationship between the severity of the offense and the harshness of the sanction. The criminal law principle that the punishment should fit the crime is appropriately adapted to school discipline and has been applied in a case challenging racial discrimination in disciplinary expulsions. In *Rhyne v. Childs*, 359 F. Supp. 1085 (N.D. Fla. 1973) the court found that the statistical disparity of black suspensions resulted from the black students' decision to forego corporal punishment and elect suspension. In the course of the opinion that upheld the school's disciplinary policies and procedures, the court said:

> ...the severity of the punishment meted out by the defendant school board does not appear commensurate with the severity of the acts committed, and this Court is of the view that the expulsions should not be made permanent but that they be lifted after the present school year terminates.

Fairness in disciplinary penalties is the next logical step from fairness in disciplinary procedures. Major penalties should be reserved for major violations. This does not mean that the federal courts are free to review, revise, and revoke school disciplinary actions. Rather, it is an attempt to define for educators the limits of their disciplinary authority so that their discretion cannot be characterized as overly broad and unbridled.

Large grants of discretion to discipline are still another source of potential discrimination. It is not the function of courts to take away or second guess the exercise of that discretion, so long as that discretion is deliberately and carefully carried out. (*Board of Curators of the University of Missouri v. Horowitz*, 98 S.Ct.; 1978). The courts have only imposed "rudimentary" procedural requirements as to notice, explanation, and hearing to ensure that the disciplinary decisions are not unfair, mistaken, erroneous, unwarranted, or arbitrary (*Goss v. Lopez*). These procedural safeguards serve as a minimum constitutional check or "meaningful hedge" against erroneous action--not as a deterrent to disciplinary action.

However, discretion, properly guided and understood, permits the administrator to weigh the individual circumstances of each case. In this way, discretion allows and assures that students will be treated on an individual basis and not on the basis of improper criteria. As Justice Douglas declared in his dissent in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), equal protection commands the elimination of racial barriers and consideration of each student "in a racially neutral way." Justice Douglas believed that "(t)he consideration of race...normally introduces a capricious and irrelevant factor working in an invidious discrimination." See also *Regents of the University of California v. Bakke*, 98 S.Ct. 2733 (1978) in which Justice Powell, speaking for a split Court, upheld the use of race as one, among other, criteria to remedy findings of past

discrimination, but more importantly, noted that Equal Protection guarantees the right to individualized consideration without regard to race. (fn. 52).

Disciplinary discretion must be fairly exercised. There is no strict requirement that an administrator be absolutely impartial and free from all information or involvement in a discipline case. The administrator personally may have "witnessed the conduct forming the basis of the charge" (*Goss*). In such a situation, the administrator need not delegate disciplinary authority to another official to conduct the informal hearing, unless he or she feels compelled to do so by the nature of the act witnessed or the student involved. Such a procedure might prove too costly and time-consuming.

While it is advisable that administrators be objective and impartial in the sense of not having any personal prejudice, bias, animosity, or animus against the student, "mere familiarity with the facts" or the "taking of a position on the matter" do not disqualify the decision maker, *Hortonville School District v. Hortonville Education Association*, 49 L.Ed. 2d 1(1976). The impartiality standard is whether the administrator has the capacity to fairly judge the particular controversy on the basis of its own circumstances.

Conclusions

The dilemma of disciplinary discretion is that on the one hand it avoids discrimination by allowing individualized treatment, but on the other hand it invites discrimination by leaving it up to the administrator what discipline shall be imposed for what offenses.

The law imposes very few and easily met restraints. The discretion to administer fairly nondiscriminatory discipline rests squarely in the hands of the educators, not judges. Principals should jealously guard that discretion by strictly scrutinizing their procedures and policies to determine whether in fact such procedures and policies have a disproportionate or discriminatory effect and whether such procedures and policies in fact further legitimate educational functions. If principals abdicate this awesome responsibility to test the educational rationality of their rules and regulations, the courts may well be forced to do the job for them. It would be hard to say in whose best interests the results of such an undertaking would be.

Recommendations

1. Make all disciplinary rules as clear and precise as possible, avoiding distinctions based on race, sex, or physical handicap.
2. If a rule seems to have a disproportionate negative effect upon students of one race, sex, or other group which might claim discrimination, make sure that:
   a) the rule has a legitimate educational purpose; and
   b) the disproportionate impact has a demonstrable, nondiscriminatory cause.
3. Make sure that fair rules are being administered in a fair manner; there is nothing wrong with the use of administrative discretion--if it is exercised in a rational consistent way, free of bias.
4. Disciplinary penalties should not only be those permissible under state law, but should be appropriate in severity to the rule violation involved.

5. Demonstrate concern about any policy which has a disproportionate negative effect upon any legally protected group. A reputation for fairness can avoid the need to expend much valuable time and effort defending a policy or procedure.

The Legal Memorandum was contributed by Arthur H. Goldsmith, Esq., research associate, Office of the President, Boston University, and associate in the firm of Snyder & Weinstein, Boston, Mass.

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